

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH CAPOGRECO, et al.,

Plaintiffs,

No. CIV S-00-1951 LKK GGH P

vs.

R. SANDHAM, et al.,

Defendants.

ORDER &

FINDINGS AND RECOMMENDATIONS

Introduction/Background

Plaintiffs, state prisoners proceeding pro se, seek relief pursuant to 42 U.S.C. § 1983. There are two matters pending before the court. They are the previously vacated motions for partial summary judgment as to plaintiff Capogreco and for partial summary judgment as to plaintiff Johnson, re-noticed and re-submitted by order filed on October 13, 2004, brought by defendants Sandham, Gilkes, Malan, Lett, Parks, Castro and Tristan. Plaintiffs filed a joint (inapposite) opposition¹ to the previously vacated motions, filed on July 17, 2003 and July 18, 2003, respectively, on August 1, 2003 and then, pursuant to the order filed on October 1, 2003,

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¹See Order, filed on October 1, 2003.

1 filed another opposition, on December 4, 2003.² In its October 13, 2004 order, the court noted
2 that plaintiff Johnson had indicated that the court could proceed to adjudicate the motion for
3 partial summary judgment as to him based on his previously submitted opposition,³ and in the
4 same order, granted plaintiff Capogreco's request for the court to take judicial notice of the
5 exhibits submitted in opposition to defendants' March 18, 2002 motion to dismiss, in opposition
6 to the defendants' motion for partial summary judgment as to him. On October 21, 2004,
7 defendant Maurino renewed and re-noticed her motions for partial summary judgment as to each
8 plaintiff brought by defendant Maurino, pursuant to the court's orders filed on January 28, 2004
9 and October 13, 2004.⁴ Defendant Maurino's motion is directed at the claims made by plaintiff
10 Johnson; plaintiff Capogreco makes no allegation against her with respect to any constitutional
11 deprivation affecting him. On November 17, 2004, plaintiffs filed their opposition to defendant
12 Maurino's motion.

13 The court granted plaintiff Capogreco additional time to file exhibits and/or
14 affidavits in support of his opposition to defendants' motion for summary judgment or to
15 demonstrate that he was unable to do so, both of which he failed to do. See Orders filed on
16 January 28, 2004 and October 13, 2004. On August 5, 2005, defendants filed their response to
17 defendants' motion for summary judgment as well as to defendants' July 22, 2005 response to
18 this court's order, filed on July 5, 2005. By order filed on July 5, 2005, this court ordered
19 defendants to show proof, within 30 days, that plaintiff Johnson had been provided access to
20 plaintiffs' legal property relevant to action and access to the law library. Upon defendants'
21 showing proof of such access, if plaintiff elected to proceed on a revised or amended opposition,
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23 ²Plaintiffs were also granted an extension of time by order filed on November 7, 2003.

24 ³ Order, filed on October 13, 2004, p. 2, citing plaintiff Johnson's February 19, 2004
25 Objections to the January 28, 2004 Findings and Recommendations.

26 ⁴ Defendant Maurino's renewed notice attached as Exhibit A, her responses to plaintiffs'
first set of interrogatories, which had been served on August 5, 2003.

1 plaintiff Johnson was directed to file his opposition to the pending motion for partial summary
2 judgment as to himself within 30 days, along with any exhibits. Alternatively, upon defendants'
3 showing proof of access to the relevant legal property and to the law library, plaintiff could
4 choose to proceed solely on the previously submitted opposition and on the exhibits to plaintiffs'
5 May 4, 2002⁵ opposition to defendants' prior motion to dismiss, which constitute the opposition
6 and exhibits upon which plaintiff Capogreco rests.

7 Should defendants have failed to make the requisite showing, defendants were
8 informed that their motion for partial summary judgment as to plaintiff Johnson would be
9 vacated permanently. By filing dated July 22, 2005, the defendants have made an adequate
10 showing that plaintiff Johnson was afforded access to the law library for the relevant periods
11 following the renewed notices of motions for partial summary judgment as to each plaintiff.
12 Notice was renewed by the court on October 13, 2004 as to all defendants but defendant
13 Maurino, who filed a renewed notice of her motions for partial summary judgment as to each
14 plaintiff on October 21, 2004. However, defendants showing with respect to plaintiff Johnson's
15 access to the relevant legal property raises more questions than it answers.

16 Defendants inform the court again that plaintiff Johnson was placed in Salinas
17 Valley State Prison (SVSP) Administrative Segregation (Ad Seg) on May 31, 2003.⁶ Response,
18 p. 1. Although limitations are placed on the type and amount of property that inmates in Ad Seg
19 can access, inmates may request up to two cubic feet of legal materials if he has a verified legal
20 deadline. Response, p. 2, citing decl. of Pete Meza, SVSP Litigation Coordinator, in response to
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23 ⁵ The docket entry dates the opposition as having been filed on May 2, 2002, although the
opposition appears to be date-stamped May 4, 2002.

24 ⁶ Plaintiff Johnson allegedly had repeatedly stabbed a wheelchair-bound inmate on May
25 30, 2003. See June 1, 2003 Crime Incident Report, Exhibit A to defendants' October 30, 2003
26 response to the court's order filed on October 1, 2003. Actually, plaintiff Johnson, according to
the declaration of Lt. W. Muniz, Exhibit 2 to the Oct. 30, 2003 response to the Oct. 1, 2003
order, was not placed in Ad Seg until June 4, 2003, when space became available.

1 court's October 1, 2003 order, Exhibit F,⁷ p. 2.⁸ According to SVSP Ad Seg Lt. W. Muniz's
 2 July 11, 2005 and SVSP Senior Librarian H. Burk, plaintiff was permitted library access and
 3 access to his legal property many times while in Ad Seg. Response, Muniz decl., Exhibit A, ¶ 4;
 4 Burk decl., Exhibit B, ¶ 2. Sr. Lib. Burk avers that plaintiff had Priority Legal User (PLU) status
 5 from October 14, 2003 through December 7, 2004 and from February 3, 2004 through February
 6 17, 2004. Burk decl., Exhibit B, ¶ 5. Specifically, Burk avers that plaintiff Johnson actually
 7 received access to the library on Oct. 14, 2003, Oct. 29, 2003, Nov. 12, 2003, Nov. 19, 2003;
 8 Nov. 26, 2003, Dec. 2, 2003, Dec. 5, 2003 Dec. 10, 2003, Dec. 17, 2003, Jan. 21, 2004, Feb. 3,
 9 2004. Id., ¶ 6. Further, according to Burk, plaintiff Johnson received law library paging services
 10 on Dec. 8, 2003 and on Dec. 30, 2003. Id., ¶ 7. Finally, on Nov. 4, 2003 and on Feb. 10, 2003,
 11 plaintiff is alleged to have refused law library access which he had been granted. Id., ¶ 8.
 12 According to Muniz, plaintiff Johnson did not submit any inmate appeals regarding any legal
 13 issues. Muniz decl., Exhibit B, ¶ 11.

14 While defendants make an adequate showing that plaintiff Johnson was allowed
 15 access to the prison law library for the relevant period following the October 13, 2003 and
 16 October 21, 2003 re-notice of the pending motions, they do not make a definitive showing that
 17 plaintiff Johnson was allowed access to the legal property relevant to this case which would
 18 include both of the plaintiffs' legal property, an objection plaintiff Johnson raised in his filing of
 19 Nov. 17, 2003, and a failing which the court had intended to cure by its order filed on January 28,
 20 2004. Instead, defendants merely demonstrate that plaintiff was subject to restrictions in Ad Seg,
 21 refer generally to regulations applicable as to the amount of property Ad Seg inmates are allowed
 22 under certain conditions, and conclusorily assert that plaintiff was allowed access to his legal
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24 ⁷ Excerpt of SVSP Operational Procedure 29 B, procedures applicable to Ad Seg unit
 25 inmates. Exhibits F and G to the Oct. 30, 2003 response to the Oct. 1, 2003 order.

26 ⁸ Defendants incorrectly refer to Exhibit G; the text referencing the amount and
 conditions upon which legal materials may to be issued to an Ad Seg inmate. Response, p. 2.

1 property on “many occasions.” Neither of the declarants relied on by defendants (Muniz, Burk)
2 make any specific representation of when and to what legal property plaintiff was allowed access.
3 Unsurprisingly, plaintiff Johnson refutes defendants’ representation that he has been, in
4 particular, allowed adequate access to his relevant legal property. Plaintiff’s reply, filed on
5 August 5, 2005. Plaintiff contends that it takes 30 to 60 days for a request for access to his legal
6 property to be processed, that most of the requests were not answered and that some concerned
7 unrelated legal matters that he has pending. Id., p. 2. The court simply cannot proceed with this
8 defendants’ showing on defendants’ motion for partial summary judgment as to inmate Johnson,
9 notwithstanding his purported wish to proceed even though he argues that defendants have not
10 complied with this court’s order. Id., p. 3. Plaintiff Johnson seeks to proceed only on his own
11 terms and the court, of course, cannot be so limited. It appears that the undersigned has little
12 choice but to schedule an evidentiary hearing to resolve the question of the access to the relevant
13 legal property allowed by parties who are not defendants, SVSP prison staff, that plaintiff
14 Johnson has been afforded for the purpose of obtaining exhibits and/or affidavits in support of
15 his opposition to defendants’ motion for partial summary judgment as to him. Defendants have
16 made an effort to respond to the court’s July 5, 2005 order, so the court will not vacate the
17 motion for partial summary judgment as to plaintiff Johnson permanently, but must do so at this
18 time and can only proceed herein to adjudicate the motion for partial summary judgment as to
19 plaintiff Capogreco.

20 Amended Complaint

21 The court hereby takes judicial notice of its Findings and Recommendations, filed
22 on January 6, 2003,⁹ and in its Findings and Recommendations, filed on January 28, 2004,¹⁰ and
23 sets forth the summary of the operative complaint as contained therein at pages 1-3:

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25 ⁹ Adopted by Order filed on March 19, 2003.

26 ¹⁰ Adopted by Order filed on September 20, 2004.

This action is proceeding on an amended complaint, filed on March 7, 2001; the original complaint was filed on September 8, 2000. The gravamen of plaintiffs' extensive amended complaint is that they have been deprived of adequate medical care, including dental and psychiatric care, in violation of their rights under the Eighth Amendment. Plaintiff Capogreco was not treated for possible seizures and a degenerative back and foot problem and was not issued proper authorization for lifts he needed from defendants High Desert State Prison (HDSP) acting Chief Medical Officers (CMO) Sandham and Gilkes to correct his lower back and mobility problems for over a year. Amended Complaint (Am. Cmpl.), pp. 1-3. Plaintiff Johnson, a brittle diabetic, has been told by defendants Sandham and Gilkes that he needed a special diet to control blood sugar levels but they have not prescribed any such diet. Am. Cmpl., pp. 1-3. Defendants Sandham and Gilkes have also refused to order blood tests needed by plaintiff Johnson or authorized his access to a glucometer. *Id.*, at pp. 2-3.

Defendant Malan, Health Care Manager at HDSP, as well as a dentist, has not addressed plaintiffs' medical problems properly because he is not qualified as a dentist to make the medical evaluations needed by plaintiffs and have jeopardized plaintiffs' lives. Am. Cmpl., pp. 3-4.

Defendant Lett, a "psychiatrist"¹¹ at HDSP, having prescribed Depakote for plaintiff Capogreco, refused to renew the prescription, causing plaintiff to suffer three seizures due to withdrawal. Am. Cmpl., p. 4. Lett also did not order blood work to see if the Depakote may have damaged plaintiff Capogreco's liver, failed to obtain plaintiff's informed consent prior to prescribing the Depakote, and caused plaintiff stress by an effort "to incite a physical and verbal confrontation with plaintiff Capogreco." *Id.*, pp. 4-5.

Defendant Maurino, dietician at HDSP, refuses to issue special diets to mainline diabetics. Am. Cmpl., p.5. Defendant Parks, D.D.S., a dentist at HDSP, has failed to provide plaintiffs with the routine dental care to keep minor problems from turning into major ones, causing them unnecessary pain and suffering. *Id.*, at pp. 6 - 7.

Defendant Castro, the Warden at HDSP, has refused to make the necessary changes to ensure that inmates receive proper medical care. Am. Cmpl., p. 7. Defendant Tristan, C.D.C. Director, is responsible for insuring that inmates receive proper medical care; his failure to investigate problems and make necessary changes to medical treatment has resulted in unnecessary pain and suffering to

¹¹ Plaintiffs assert that defendant Lett has a Ph.D., not an M.D. Perhaps they meant to characterize him as a psychologist.

1 plaintiffs. Id., p. 8.

2 Plaintiffs, inter alia, also allege that HDSP improperly processes
3 602 inmate appeals containing medical grievances in that prison
4 authorities either refuse to process the appeal at all, or, if the appeal
5 does process beyond the informal level review, the inmate appeals
6 office makes no effort to enforce time constraints for staff
7 response. Am. Cmpl., p. 10. This results in inmates having to wait
8 for a year or more before resolution of the 602 appeal, during
9 which time medical care has been denied. Id., p. 10.

10 Plaintiffs seek injunctive relief as well as monetary damages. Am.
11 Cmpl., pp. 22-23.

12 Plaintiffs' injunctive relief claims against the defendants employed at High
13 Desert State Prison, Sandham, Lett, Parks, Castro, Maurino, Gilkes and Malan, that is all but
14 those against C.D.C. (Chief Deputy) Director Tristan, have been dismissed pursuant to an order
15 filed on March 19, 2003, adopting the January 6, 2003 findings and recommendations, as
16 plaintiffs have been transferred from HDSP to Salinas Valley State Prison (SVSP).

17 Motion for Partial Summary Judgment as to plaintiff Capogreco

18 Because there are two plaintiffs in this action, defendants have brought a motion
19 for partial summary adjudication as to each, in seeking entry of summary judgment as to the
20 entire action in their favor. However, as noted, the court will proceed to adjudication only of the
21 motion for partial summary judgment as to plaintiff Capogreco, proceeding on the only
22 remaining claims for relief, which are solely in the form of money damages. Although the court
23 should not be compelled to cobble together plaintiff Capogreco's exhibits, the undersigned has
24 granted plaintiffs' request for the court to take judicial notice of the exhibits filed with their
25 opposition to the defendants' March 18, 2002 motion to dismiss. See Order filed on October 13,
26 2004. The court will also take judicial notice¹² of plaintiffs' exhibits filed on August 31, 2001 in

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¹² A court may take judicial notice of court records. See Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994); MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 opposition to the defendants' original motion to dismiss on July 24, 2001.¹³ The court will
2 identify exhibits from the 2001 opposition as "2001 opp. exh." and from the May 2, 2002
3 opposition as "2002 opp. exh."

4 Legal Standard for Summary Judgment

5 Summary judgment is appropriate when it is demonstrated that the standard set
6 forth in Fed. R. Civ. P. 56(c) is met. "The judgment sought shall be rendered forthwith if . . .
7 there is no genuine issue as to any material fact, and . . . the moving party is entitled to judgment
8 as a matter of law." Fed. R. Civ. P. 56(c).

9 Under summary judgment practice, the moving party always bears the initial
10 responsibility of informing the district court of the basis for its motion, and identifying those
11 portions of "the pleadings, depositions, answers to interrogatories, and admissions on file,
12 together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue
13 of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct., 2548, 2553 (1986).

14 "[W]here the nonmoving party will bear the burden of proof at trial on a
15 dispositive issue, a summary judgment motion may properly be made in reliance solely on the
16 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed,
17 summary judgment should be entered, after adequate time for discovery and upon motion, against
18 a party who fails to make a showing sufficient to establish the existence of an element essential
19 to that party's case, and on which that party will bear the burden of proof at trial. See id. at 322,
20 106 S. Ct. at 2552. "[A] complete failure of proof concerning an essential element of the
21 nonmoving party's case necessarily renders all other facts immaterial." Id. In such a
22 circumstance, summary judgment should be granted, "so long as whatever is before the district
23 court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is
24 satisfied." Id. at 323, 106 S. Ct. at 2553.

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26 ¹³ This motion was vacated by order filed on February 4, 2002.

1 If the moving party meets its initial responsibility, the burden then shifts to the
2 opposing party to establish that a genuine issue as to any material fact actually does exist.
3 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356
4 (1986). If the moving party meets its initial responsibility, the burden then shifts to the opposing
5 party to establish that a genuine issue as to any material fact actually does exist. See Matsushita
6 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). In
7 attempting to establish the existence of this factual dispute, the opposing party may not rely upon
8 the allegations or denials of its pleadings but is required to tender evidence of specific facts in the
9 form of affidavits, and/or admissible discovery material, in support of its contention that the
10 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11, 106 S. Ct. at 1356 n.
11 11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that
12 might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby,
13 Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec.
14 Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the
15 evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool
16 v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

17 In the endeavor to establish the existence of a factual dispute, the opposing party
18 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
19 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
20 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary
21 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
22 genuine need for trial.’” Matsushita, 475 U.S. at 587, 106 S. Ct. at 1356 (quoting Fed. R. Civ. P.
23 56(e) advisory committee’s note on 1963 amendments).

24 In resolving the summary judgment motion, the court examines the pleadings,
25 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
26 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,

1 477 U.S. at 255, 106 S. Ct. at 2513. All reasonable inferences that may be drawn from the facts
2 placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S.
3 at 587, 106 S. Ct. at 1356. Nevertheless, inferences are not drawn out of the air, and it is the
4 opposing party's obligation to produce a factual predicate from which the inference may be
5 drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
6 aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing
7 party "must do more than simply show that there is some metaphysical doubt as to the material
8 facts Where the record taken as a whole could not lead a rational trier of fact to find for the
9 nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587, 106 S.Ct.
10 1356 (citation omitted).

11 On May 25, 2001, the court advised plaintiffs of the requirements for opposing a
12 motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154
13 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999), and Klinge v.
14 Eikenberry, 849 F.2d 409 (9th Cir. 1988).

15 *Legal Standard for Eighth Amendment Claim*

16 In order to state a § 1983 claim for violation of the Eighth Amendment based on
17 inadequate medical care, plaintiff must allege "acts or omissions sufficiently harmful to evidence
18 deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct.
19 285, 292 (1976). To prevail, plaintiff must show both that his medical needs were objectively
20 serious, and that defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter,
21 501 U.S. 294, 299, 111 S. Ct. 2321, 2324 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir.
22 1992) (on remand). The requisite state of mind for a medical claim is "deliberate indifference."
23 Hudson v. McMillian, 503 U.S. 1, 4, 112 S. Ct. 995, 998 (1992).

24 A serious medical need exists if the failure to treat a prisoner's condition could
25 result in further significant injury or the unnecessary and wanton infliction of pain. Indications
26 that a prisoner has a serious need for medical treatment are the following: the existence of an

1 injury that a reasonable doctor or patient would find important and worthy of comment or
2 treatment; the presence of a medical condition that significantly affects an individual's daily
3 activities; or the existence of chronic and substantial pain. See, e.g., Wood v. Housewright, 900
4 F. 2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01
5 (9th Cir. 1989). McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other
6 grounds, WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

7 In Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994) the Supreme Court
8 defined a very strict standard which a plaintiff must meet in order to establish "deliberate
9 indifference." Of course, negligence is insufficient. Farmer, 511 U.S. at 835, 114 S. Ct. at 1978.
10 However, even civil recklessness (failure to act in the face of an unjustifiably high risk of harm
11 which is so obvious that it should be known) is insufficient. Id. at 836-37, 114 S. Ct. at 1979.
12 Neither is it sufficient that a reasonable person would have known of the risk or that a defendant
13 should have known of the risk. Id. at 842, 114 S. Ct. at 1981.

14 It is nothing less than recklessness in the criminal sense—a subjective standard—
15 disregard of a risk of harm of which the actor is actually aware. Id. at 838-842, 114 S. Ct. at
16 1979-1981. "[T]he official must both be aware of facts from which the inference could be drawn
17 that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837,
18 114 S. Ct. at 1979. Thus, a defendant is liable if he knows that plaintiff faces "a substantial risk
19 of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. at
20 847, 114 S. Ct. at 1984. "[I]t is enough that the official acted or failed to act despite his
21 knowledge of a substantial risk of serious harm." Id. at 842, 114 S. Ct. at 1981. If the risk was
22 obvious, the trier of fact may infer that a defendant knew of the risk. Id. at 840-42, 114 S. Ct. at
23 1981. However, obviousness per se will not impart knowledge as a matter of law.

24 Also significant to the analysis is the well established principle that mere
25 differences of opinion concerning the appropriate treatment cannot be the basis of an Eighth
26 Amendment violation. Jackson v. McIntosh, 90 F.3d 330 (9th Cir. 1996); Franklin v. Oregon,

1 662 F.2d 1337, 1344 (9th Cir. 1981).

2 Moreover, a physician need not fail to treat an inmate altogether in order to violate
3 that inmate's Eighth Amendment rights. Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir.
4 1989). A failure to competently treat a serious medical condition, even if some treatment is
5 prescribed, may constitute deliberate indifference in a particular case. Id.

6 Additionally, mere delay in medical treatment without more is insufficient to state
7 a claim of deliberate medical indifference. Shapley v. Nevada Bd. of State Prison Com'rs, 766
8 F.2d 404, 408 (9th Cir. 1985). Although the delay in medical treatment must be harmful, there is
9 no requirement that the delay cause "substantial" harm. McGuckin, 974 F.2d at 1060, citing
10 Wood v. Housewright, 900 F.2d 1332, 1339-1340 (9th Cir. 1990) and Hudson, 112 S. Ct. at 998-
11 1000. A finding that an inmate was seriously harmed by the defendant's action or inaction tends
12 to provide additional support for a claim of deliberate indifference; however, it does not end the
13 inquiry. McGuckin, 974 F.2d 1050, 1060 (9th Cir. 1992). In summary, "the more serious the
14 medical needs of the prisoner, and the more unwarranted the defendant's actions in light of those
15 needs, the more likely it is that a plaintiff has established deliberate indifference on the part of
16 the defendant." McGuckin, 974 F.2d at 1061.

17 Superimposed on these Eighth Amendment standards is the fact that in cases
18 involving complex medical issues where plaintiff contests the type of treatment he received,
19 expert opinion will almost always be necessary to establish the necessary level of deliberate
20 indifference. Hutchinson v. United States, 838 F.2d 390 (9th Cir. 1988). Thus, although there
21 may be subsidiary issues of fact in dispute, unless plaintiff can provide expert evidence that the
22 treatment he received equated with deliberate indifference thereby creating a material issue of
23 fact, summary judgment should be entered for defendants. The dispositive question on this
24 summary judgment motion is ultimately not what was the most appropriate course of treatment
25 for plaintiff, but whether the failure to timely give a certain type of treatment was, in essence,
26 criminally reckless.

1 Discussion

2 Defendants aver that there remains no genuine issue of material fact in dispute
3 and that plaintiff Capogreco has not been subjected to any defendant's deliberate indifference to
4 plaintiff's serious medical needs care in violation of the Eighth Amendment, nor plaintiff stated a
5 claim for supervisory liability. See Motion for Summary Judgment re: Capogreco (MSJC).

6 The Chief Medical Officer (CMO) at Salinas Valley State Prison, Dr. Charles Lee,
7 not a defendant, conducted a review of plaintiff Capogreco's medical history relevant to the
8 issues in this action. MSJC, Exhibit A, Lee Declaration, ¶ 5. Dr. Lee notes that plaintiff
9 Capogreco was transferred to High Desert State Prison (HDSP) on May 26, 1999 and was housed
10 there until he was transported to Salinas Valley State Prison (SVSP) on September 4, 2002. Lee
11 Decl. ¶ 4. At the time of his transfer to HDSP, Capogreco's medical history indicated that he had
12 Hepatitis C; lower back pain; one leg shorter than the other, a condition which required that he
13 have shoe lifts and special boot chronos; sinus and allergy problems; high blood pressure; bipolar
14 disorder; and the need for corrective lenses. MSJC, p. 4, Lee Decl., ¶ 8. Upon his transfer to
15 HDSP, medical staff conducted an intake screening of plaintiff Capogreco. MSJC, p. 4, Lee
16 Decl., ¶ 9, Exhibit 1, Capogreco Medical Records (MR), pp. 145-146. At that time, Capogreco
17 informed the intake registered nurse that he was not currently under a doctor's care for medical,
18 dental or psychiatric reasons; he was not taking medications and had no special health care needs,
19 and that he did not suffer from cough, fever, night sweats, or unexplained weight loss. Id.

20 Plaintiff contends in his amended complaint that he "had a possible problem with
21 seizures and and a degenerative back and foot problem and needed to be seen by medical staff,"
22 which was not done. AC, p. 1. In his opposition, plaintiff does not indicate that he made any
23 reference to a seizure problem, but does state that he informed medical staff on intake that he was
24 under dental care and needed a tooth filled. Opp., p. 2. He also claims to have said that while he
25 was not currently receiving CCCMS medication, he was still part of the program and needed to
26 see a psychiatrist. Id. Defendants point out that the medical records indicate that plaintiff had

1 been discharged from the mental health treatment program he was on prior to his transfer to
2 HDSP. MSJC, p. 5, Lee Decl., ¶ 12, MR, pp. 292, 389. The intake form does record that
3 plaintiff had a short leg and lower back pain, needed shoe lifts, had an Ampicillin allergy which
4 would result in a rash, and had been taken off Depakote some three weeks earlier after being on it
5 for 90 days. MSJC, pp. 4-5, Lee Decl., ¶ 9, MR, p. 145. The form also indicates that plaintiff
6 claimed not to be suicidal, did not wish to hurt either himself or others and did not have a current
7 mental health problem. MSJC, p. 5, Lee Decl., ¶ 9, MR, p. 145. Plaintiff was referred to a
8 medical doctor within 72 hours. Lee Decl., ¶ 9, MR, p. 146. On the form itself, under “Special
9 Needs” the words “Medical - Refer To” and “Mental Health - Refer To” are circled, although no
10 specific health care provider is named, and the referral is marked as to occur within 72 hours.
11 MR, p. 146. Defendants point to no exhibit which indicates that plaintiff was, in fact, seen
12 within 72 hours by any HDSP medical staff.

13 Defendant Parks

14 Plaintiff disputes HDSP’s contentions with respect to his representations upon
15 intake to a limited extent; he asserts that, during intake, he informed staff that he had been
16 receiving dental care and needed a tooth filled and that even though he was not currently taking
17 CCCMS medication he was still part of the program and needed to see a psychiatrist.
18 Opposition (Opp.), filed December 4, 2003, p. 2. Plaintiff contends that prior to his transfer to
19 HDSP, a Mule Creek State Prison dentist determined that follow up treatment for a possible
20 cavity was necessary and that plaintiff should have the receiving institution refer him to a dentist
21 upon his arrival. *Id.*, pp. 2-3. Plaintiff does not note within his medical records any exhibit in
22 support of his assertions. The cavity was not filled at Mule Creek State Prison (MCSP) because
23 plaintiff was pending transfer. *Id.*, p. 3. Not until more than 12 months later, on July 17, 2000,
24 was plaintiff seen by HDSP dental staff when his # 15 molar was given a filling. *Id.*, citing
25 defendants’ exhibit, MR, p. 275, which confirms the date of the filling, noting deep decay.

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1 Because plaintiff cites no evidentiary basis for his contentions and the court's
2 review of plaintiff's previously submitted exhibits in opposition to prior motions does not reveal
3 a basis for plaintiff's contention with respect to his dental condition upon intake at HDSP, his
4 recollection of the events upon intake are only hearsay. However, even assuming that plaintiff is
5 correct, plaintiff has not shown that defendants in not filling a cavity until a year or slightly more
6 after his transfer have shown deliberate indifference to a serious medical condition. The Ninth
7 Circuit recognizes that "dental care is one of the most important medical needs of inmates."
8 Hunt v. Dental Dept., 865 F.2d 198, 200 (9th Cir. 1989) [citation omitted]. While "the Eighth
9 Amendment requires that prisoners be provided with a system of adequate dental care," id., citing
10 Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982), "....delay in providing a prisoner with
11 dental treatment, standing alone, does not constitute an Eighth Amendment violation." Id.,
12 citing Shapley v. Nevada Bd. of State Prison Comm'rs., 766 F.2d 404, 407 (9th Cir. 1985).

13 Within his amended complaint, plaintiff alleges that defendant Parks, "head of the
14 dental department" at HDSP failed to see him within fourteen days of his arrival at HDSP, as
15 required by (CDC) policy, review his dental records, and work up a treatment plan, if one was
16 necessary. Am. Cmpl., p. 6. Plaintiff states that dental staff at Mule Creek had scheduled "minor
17 dental work" but before performing it, plaintiff was transferred. Id. Plaintiff alleges that
18 defendant Parks' failure to do the 14-day work up resulted in a delay of a year and a half in
19 treating what had been a minor problem but became a major one due to the delay. Id. Plaintiff
20 alleges that in the intervening months, he complained about sensitivity and intermittent pain and
21 defendant's refusal to follow procedure resulted in his unnecessary pain and suffering. Id.

22 From the point of intake to the treatment of the problem which was performed by
23 a non-defendant, Dr. B. Hoag,¹⁴ fourteen months elapsed (not a year and a half). While
24 defendant may have failed to comply with departmental policy in not doing a work-up of
25

26 ¹⁴ MSJC, pp. 10-11, Lee Decl., ¶ 24, MR, p. 275.

1 plaintiff's dental condition within two weeks of plaintiff's arrival at HDSP, while arguably
2 negligent, does not constitute an Eighth Amendment violation. Plaintiff himself concedes that
3 the problem at the outset was minor. Nor, as noted, does plaintiff point to exhibits demonstrating
4 that he had informed defendants of the sensitivity and occasional pain he suffered. Plaintiff's
5 characterization of the problem as having become "major" by the time of treatment does not
6 constitute an expert opinion in support of a finding that his need for a filling constituted a serious
7 medical condition. Plaintiff complains of some discomfort caused by the delay of treatment but
8 even his allegations do not set forth any basis for a finding that he suffered to such a degree by
9 the delay that defendant Parks can be said to have shown deliberate indifference to a serious
10 medical (or dental) condition. What plaintiff has, at best, demonstrated is that he was subject to
11 delayed treatment for a condition that he himself characterizes, at least at the outset, as "minor."
12 The court will recommend that summary judgment be granted to defendant Parks.

13 Defendant Lett

14 Within the amended complaint, plaintiff Capogreco alleges that defendant Lett
15 prescribed Depakote for plaintiff, then refused to renew the prescription causing plaintiff to
16 suffer three seizures. Am. Cmpl., p. 4. The drug's manufacturer/Physician's Desk Reference
17 warns that taking a patient off Depakote "cold" may cause seizure for those prescribed 25 mg or
18 more; at the time, plaintiff was taking 2000 mg. Id. Defendant Lett refused to order blood
19 work to test for any liver damage caused by the medication. Id. Despite plaintiff's requests
20 about any problems related to taking Depakote, defendant Lett did not provide information
21 relating to this issue, nor did he obtain plaintiff's informed consent before prescribing the drug.
22 Am. Cmpl., p. 5. Defendant Lett "attempted to incite a physical and verbal confrontation" with
23 plaintiff, which caused security problems as well as severe mental stress to plaintiff, which stress
24 plaintiff should avoid do to his "severe organic and non-organic brain disorders." Id.

25 Because there is no dispute that plaintiff suffers from a mental condition or
26 conditions, the court will not recount his medical history on this issue in detail. As early as May

23, 1985, plaintiff had been diagnosed as suffering from various mental disorders; defendants note that as of December 8, 1994, psychiatrists concluded that plaintiff had a severe mental disorder, chronic bipolar disorder, and an antisocial personality disorder. Opp., pp. 5-6, Lee Decl., ¶ 12, MR, pp. 294,¹⁵ 297-342. A Dr. Sheppard prescribed 500 mg of Depakote as far back as 1994. Lee Decl., ¶ 12, MR, p. 294. In a July 6, 1998 assessment noting his CCCMS (clinical case management) placement, plaintiff was described as bipolar and suffering from paranoia. Lee Decl., ¶ 12, MR, pp. 351-354. Plaintiff was discharged from the mental health treatment program he had been in at MCSP on May 19, 1999. Lee Decl., ¶ 12, MR, pp. 292, 389.

Upon his transfer to HDSP, there is no dispute that plaintiff made a number of requests to be seen by a psychiatrist. Lee Decl., ¶ 12, MR, p. 387. It is noted, on August 6, 1999, in his medical records that plaintiff had made “multiple requests” to be seen, but was a “no-show” on that date; on August 10, 1999, plaintiff missed a psychiatric interview apparently due to a housing move. MR, p. 387.

Plaintiff submitted a 602 appeal log. number B 99-02226, dated September 13, 1999, wherein he states that sick call requests for psychiatric care in May and June of 1999. 2002 opp. exh. G. He also put in a request following a July 31, 1999 move from Facility D to Facility B. Id. Plaintiff writes that he was seen in the second week in August by someone in mental health, but the doctor could do nothing for him because he did not have his medical file and plaintiff was told he would be seen again in two weeks. Id. When plaintiff, on September 13, 1999, asked an M.T.A. why he had not received medical care, he was told that he had been called for two weeks earlier but had refused. Id. Because there was a lockdown at the time of the alleged refusal, plaintiff asked building staff who said they did not recall an M.T.A. calling for plaintiff or that plaintiff had ever refused to go anywhere. Id. Plaintiff complains that he has received no medical or mental health attention since May of 1999 despite his requests. Id.

¹⁵ Defendants and Dr. Lee mistakenly refer to page 194, rather than page 294 of the MR.

1 Defendants assert that plaintiff was seen on October 1, 1999 by defendant Lett,
2 “after some missed appointments” (which are not explained); no reference is made to any
3 abortive mid-August 1999 visit to which plaintiff refers. Lee Decl. ¶ 12, MR, pp. 372, 384, 386.
4 No particular explanation is provided by defendants for their failure to provide a psychiatric
5 interview for plaintiff prior to October, 1999, despite his many requests, nor is there any
6 explanation for his apparently not having been seen by a psychiatrist within 72 hours of his
7 having been screened upon transfer. Plaintiff claims that he was denied mental health treatment,
8 despite his appeals for almost four months. Opp., p. 5. However, plaintiff’s allegations against
9 defendant Lett, as noted, focus on other issues.

10 On October 1, 1999, defendant Lett noted plaintiff’s history of bipolar disorder
11 and prescribed 500 mg of Depakote (which plaintiff had been off of since three weeks prior to his
12 transfer to HDSP on May 26, 1999). Lee Decl., ¶ 20, MR, pp. 384, 386. On October 13, 1999,
13 plaintiff was placed in HDSP’s mental health program, so plaintiff’s bipolar disorder, stress and
14 anger management could be monitored and treated. Lee Decl., ¶ 12, MR, pp. 350, 358, 368, 371-
15 373, 375, 378-384, 465-467. Plaintiff was prescribed Depakote/Divalproex from October 1,
16 1999 onward. Lee Decl., ¶ 12, MR, pp. 4-6, 8-9, 11-13, 16-18, 102-111, 371.

17 As to plaintiff’s allegation that defendant Lett did not obtain his informed consent
18 before prescribing Depakote, defendants observe that plaintiff signed a consent form or waiver
19 with respect to this medication, provided by another physician earlier, on February 10, 1998.
20 MR, pp. 99, 474. Plaintiff does not dispute that he had signed an earlier waiver; plaintiff’s claim
21 that he was deprived of adequate medical care on the ground that defendant Lett failed to require
22 another waiver as to the same medication is not supportable.

23 Once plaintiff was prescribed 500 mg of Depakote on October 1, 1999 for 90 days
24 or until December 29, 1999,¹⁶ the prescription was renewed by defendant Lett on December 7,
25

26 ¹⁶ Dr. Lee mistakenly calculates the year as 2000, rather than 1999,

1999,¹⁷ which covered the time from December 8, 1999 until February 8, 2000; Dr. Mericle, not a defendant, renewed the prescription on February 9, 2000, covering the period of time from February 10, 2000 through May 10, 2000, which was continued through May 15, 2000 by Dr. Rhee who renewed the prescription from May 16, 2000 through November 12, 2000;¹⁸ defendant Lett renewed the prescription for 30 days on November 9, 2000 and Dr. Rohlfing, not a defendant, continued the prescription from November 27, 2000 through May 27, 2001. Lee Decl., ¶ 20, MR, pp. 5, 8-9, 11-13, 16-18, 108-109, 102-105, 110-111, 372, 377, 384, 386, (The amended complaint was filed on March 7, 2001). The record also does not demonstrate that defendant Lett refused to renew the Depakote prescription, leading to plaintiff's having suffered three seizures. While Dr. Lee attests that there were two short gaps of time when the Depakote prescription ran out before it was renewed, between February 8, 2000 through February 9, 2000, and between May 16, 2000 and May 17, 2000, he nevertheless asserts that plaintiff's three alleged seizures could have only occurred in the February, 8-9, 2000 gap time frame, for which he declares there is no record. Lee Decl., ¶ 20, MR 367, 472-473. Defendants seek to make the point, however, that no physician discontinued the medication. MSJC, p. 9, n. 3, citing MR 367, 472-473.

In a memorandum by Chief Psychiatrist Minn (not a defendant), dated April 16, 2001, Dr. Minn states that there is no evidence in plaintiff's medical files that defendant Lett or any other doctor ever discontinued plaintiff's Depakote or that plaintiff ever suffered three seizures. Lee Decl., ¶¶ 20, 23, MR, pp. 472-473. He writes that plaintiff refused to see defendant Lett after the first interview. Some confusion arises from the timeline Dr. Minn sets

¹⁷ On December 7, 1999, at plaintiff's request that his dosage of Depakote be increased and due to plaintiff's "hyper" state, defendant Lett increased the dosage from 500 mg to 1000 mg for 60 days. MSJC, p. 10, Lee Decl. ¶ 23, MR, pp. 17, 373.

¹⁸ A prescription for Depakote/Divalproex was prescribed for 90 days by Dr. Rhee on August 14, 2000, which would have been the time that a 90-day prescription from May 16, 2000 would have run out. MR, pp. 11-12. The prescription on August 14, 2000 indicates a prescription for seizure. MR, p. 11.

1 forth. He first indicates that Dr. Rhee, not defendant Lett, first prescribed 2 tablets daily of 500
2 mg of Depakote for 90 days on August 14, 2000 for seizure disorder. He then states that “[t]hen
3 Dr. Lett saw Mr. Capogreco on 10/1/99....” In the first place, of course, October of 1999
4 obviously precedes August 14, 2000; in the second place, to say that Dr. Rhee first prescribed
5 plaintiff the Depakote (assuming the year Dr. Minn meant to insert for this event was 1999, not
6 2000) does not square with the facts as set forth by defendants and their declarant, Dr. Lee, who
7 indicate that plaintiff’s first Depakote prescription at HDSP came from defendant Lett, not Dr.
8 Rhee. Third, Dr. Minn makes no reference to at least a second meeting between defendant Lett
9 and plaintiff, the December 7, 1999 event, wherein defendants aver that plaintiff sought to have
10 his Depakote dosage increased and plaintiff alleges that he and defendant Lett wound up in a
11 confrontation. Dr. Minn also notes that Depakote has a dual treatment function: for seizure
12 disorder and for bipolar disorder. Finally, Dr. Minn says in his memorandum that he knows of
13 no other specific complaint against defendant Lett other than that arising from plaintiff, but
14 nevertheless observes that, on March 14, 2001, he gave defendant Lett “a letter of instruction
15 requesting improvement of his performance.” MR, pp. 472-473.

16 In plaintiff’s 2001 opposition to defendants’ first motion to dismiss (vacated by
17 order filed on February 4, 2002) as well as his opposition to the second such motion, plaintiff
18 included as part of Exhibit C, an appeal, log no. 00-006677, dated February 8, 2000 (and
19 evidently incorrectly stamped by the prison as having been received on February 11, 1999, rather
20 than 2000), stating that defendant Lett, in retaliation for plaintiff’s having filed a 602 appeal as to
21 Lett’s alleged misconduct on December 7, 1999, had refused to renew plaintiff’s prescription for
22 2000 mg of Depakote daily on that date (presumably two doses of 1000 mg daily), February 8,
23 2000. 2001 opp. exh. C and 2002 opp. exh. C. Plaintiff further states that his prescription cannot
24 be discontinued without causing severe health risks. However, he does not complain therein that
25 he had any seizure as a result of the suspension of the prescription. Nor does plaintiff
26 specifically state that he suffered a seizure as a result of the interruption on February 8, 2000 by

1 the time he submitted his third level appeal on December 7, 2000.

2 On the other hand, plaintiff also submitted a health care request form, dated
3 February 8, 2000 (and also mis-stamped by HDSP as received in the year 1999, rather than on
4 Feb. 11, 2000), wherein he has checked “seizure” as one of the conditions for which he seeks
5 treatment. 2002 opp. exh. C. Plaintiff claims in his opposition to have suffered seizures due to
6 inadequate medical treatment, but that the fact that medical department has not entered
7 information related to his having had seizures in his medical file is a matter over which he has no
8 control. Opp., p. 3. Plaintiff alleges that there is evidence in the log book of the housing unit
9 officers that he has had seizures, but that he has not had the opportunity to complete discovery
10 and obtain log book copies. Opp., pp. 3-4. However, the court gave plaintiff ample opportunity
11 to provide additional information, in the form of exhibits and affidavits, in support of his
12 opposition, filed on December 4, 2003. See Orders filed on January 28, 2004 and October 13,
13 2004. Plaintiff cites CDC 128G chrono purportedly at page 275 of his medical records (in
14 defendants’ Exhibit 1), wherein HDSP medical staff state that he has a seizure problem;
15 however, the page he identifies describes a dental condition without reference to a seizure
16 problem and on the very next page among the conditions which are marked as not applying to
17 plaintiff is “seizure disorder.” MR, pp. 275-276. Further, the court’s review of plaintiff’s
18 exhibits to his 2001 and 2002 oppositions does not reveal the existence of such a chrono, nor
19 does the plaintiff assist the court by identifying the date of the alleged chrono or attaching a copy
20 to his opposition to the pending motion. Plaintiff states that according to the 1990 edition of a
21 report identified by plaintiff as the Consumer Reports Book Drug Information for the Consumer,
22 depakote should not be stopped without first checking with one’s physician, who “may want” to
23 reduce the amount gradually because stopping “suddenly... may cause seizures.” Opp., p. 4. The
24 quotation marks are applied by the court quoting plaintiff’s text, not another source). Id. This
25 purported caution is both general, vague, conditional and unsupported by plaintiff with an actual
26 exhibit.

1 Finally, plaintiff alludes to Dr. Rhee's having placed plaintiff back on Depakote in
2 November, 2000 due to a phone call from MTA Bates to the on-call physician when plaintiff
3 "reported having suffered a seizure to MTA Bates due to Dr. Lett's refusal to issue/renew
4 Depakote." Opp., p. 4. This simply does not make sense. In the first place, the records shows
5 that plaintiff's complaint relates to having been deprived of Depakote for the brief period of time
6 from February 8 through February 9 or February 10 of 2000, many months before November of
7 2000, a period of time for which there is no support for plaintiff's having been deprived of
8 Depakote. In the second place, plaintiff does not state that non-defendant MTA Bates actually
9 witnessed any seizure plaintiff may have suffered, but only that he acted on plaintiff's
10 representation of having suffered one. Finally, plaintiff submits no affidavit from non-defendant
11 MTA Bates, or any other exhibit, in support of his allegation. On May 18, 2001, a psychiatric
12 social worker notes that plaintiff was "receiving Depakote through medical for reported seizures
13 pending further neurologic testing." MR, p. 357. Such notations indicate that it is plaintiff, but
14 no medical expert, who avers that he actually suffered seizures. Other than plaintiff's complaints
15 and appeals of having suffered seizures as a result of retaliatory actions by defendant Lett, there
16 appears no record in support of plaintiff's allegation that has been presented to this court and no
17 expert evidence in support of plaintiff's claim.

18 The references to "seizure" in plaintiff's medical file do not substantiate that
19 plaintiff actually suffered any. Lee Decl., ¶¶ 15-16. In a letter dated January 4, 2001 addressed
20 to the California Health Services Department plaintiff claims that he suffered three seizures
21 because defendant Lett removed his medication suddenly. MR, p. 476. Plaintiff is not specific
22 therein as to the date(s) on which the removal and seizures occurred. In the April 16, 2001
23 response by Drs. Minn and Sandham (Sandham is a defendant), it is noted that there is no
24 evidence in his medical file that he ever had three seizures or that he had been brought to medical
25 attention for that reason, which should have occurred if he had suffered them. MR, p. 473.

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1 On June 12, 1999, plaintiff was given a lower bunk, lower tier and a light duty
2 medical chrono due to unequal leg length and back pain. MR, p. 224. He was designated not
3 eligible for food handling because of “seizure.” Id. Dr. Lee notes that there is no further
4 notation as to the date of any seizure or the source of the information claiming a seizure. Lee
5 Decl., ¶ 16. Plaintiff, in his opposition, offers no evidence in support of his contention that he
6 was “prone to seizures”; he states that he was denied food handling clearance due to “possible
7 seizures,” but point to no specific evidence that would form the basis for such a conclusion.
8 Opp., p. 3. On April 18, 2000, plaintiff told a psychiatric social worker that he had had a seizure
9 because defendant Lett had not tapered him off Depakote and claimed that Dr. Mericle had
10 placed him back on Depakote. MR, p. 367. On July 6, 2000, in another interdisciplinary
11 progress note, plaintiff informed a psychiatric social worker that he received “automatic renewal”
12 of seizure medication. MR, p. 364. It was noted that on May 16, 2000, Dr. Rhee had prescribed
13 Depakote for 90 days. Id. In another interdisciplinary progress note, dated November 1, 2000, it
14 was noted that Dr. Rhee had prescribed Depakote on August 14, 2000 for “90 days for seizure.”
15 MR, p. 363. Defendants contend that there is no indication whether the medication was
16 prescribed to prevent potential seizures or based on plaintiff’s claim of having suffered seizures
17 and that Depakote was also used to treat plaintiff’s bipolar disorder. Lee Decl., ¶ 16. On
18 February 21, 2001, in another interdisciplinary progress note, the psychiatric social worker notes
19 that plaintiff was receiving “seizure meds from medical.” MR, p. 362. Defendants contend that
20 seizure medication came from medical, rather than psychiatric, staff. Lee Decl., ¶ 16. The
21 court notes that there is at least one additional reference in plaintiff’s medical file mentioning the
22 word “seizure” in an August 14, 2000 prescription by Dr. Rhee for 90 days of 500 mg of
23 Depakote “for seizure.” MR, p. 11. Otherwise, the references to seizures appear to arise as a
24 result of reports by plaintiff of having suffered them. Lee decl., ¶¶ 15-17, MR No report
25 indicates that plaintiff actually suffered a seizure for which he was treated by any physician.
26 Nothing exists to indicate the basis for Dr. Rhee’s reference, whether he was acting on a report

1 by plaintiff or on whether he actually diagnosed plaintiff as ever having suffered one, or whether
2 he was simply taking a precaution. Plaintiff simply does not present enough evidence to counter
3 defendants' showing that there is no genuine issue of material fact as to the question of plaintiff
4 having suffered a seizure as a result of retaliatory action by defendant Lett.

5 As to plaintiff's complaint that defendant Lett was hostile to him on December 7,
6 1999 at which point his Depakote was discontinued abruptly by the defendant causing plaintiff's
7 seizures, plaintiff presents no expert medical evidence to counter the evidence produced by
8 defendants. In an appeal, log no. HDSP-B-00-00422, filed on February 6, 2000, plaintiff asserts
9 that he saw defendant Lett on December 7, 1999 because he was having "adjustment and anger
10 management problems," at which time defendant Lett was hostile and confrontational, seeking
11 "to elicit a verbal and/or physical response" from plaintiff and refusing to discuss plaintiff's
12 medication dosage with him, and stating that if plaintiff did not like it, he should "sue the
13 governor." MSJC, Exh. 2. Defendants concede that plaintiff has a personality conflict with
14 defendant Lett, at least from plaintiff's perspective. Lee decl., ¶ 13, MR, pp. 362, 364-367, 472-
15 473. Defendant Lett's own notes of the December 7, 1999 encounter with plaintiff makes no
16 reference to Lett's own conduct, but states that plaintiff was "very hyper today," was seeking an
17 increase in his Depakote dosage, was barely able to sit and spoke in a "rapid" and "high-pitched
18 voice." Lee Decl., ¶ 23, MR, p. 373. Defendant also notes that an increase in plaintiff's
19 "medication is probably indicated." MR, p. 373. Plaintiff's medical record indicates he was
20 dealing with stress and anger management issues prior to the incident. Lee Decl., p. 23, MR, pp.
21 379-384. Plaintiff, himself, states that his adjustment and anger problems were what prompted
22 his seeing defendant Lett that day in the first place. There is no indication that plaintiff's dosage
23 was discontinued by defendant Lett. In fact, the record indicates that plaintiff's dosage of
24 Depakote was increased by defendant Lett to 1000 mg twice a day for 60 days on December 7,
25 1999. Lee Decl., ¶ 23, MR, p. 17, 371. Even assuming defendant Lett was angry or hostile with

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1 plaintiff, such an allegation by itself, cannot rise to the level of an Eighth Amendment violation.¹⁹

2 On January 19, 2000, plaintiff told a psychiatric social worker that he was taking
3 Depakote for poor coping, poor impulse control and mood swings. Lee Decl., ¶ 23, MR 371.
4 Plaintiff also indicated that he was unhappy with defendant Lett and had “602'd him.” Id. The
5 psychiatric social worker describes plaintiff’s demeanor as “very intimidating, demanding and
6 entitled.” Lee Decl., ¶ 16, MR 371. On January 28, 2000, plaintiff refused to keep a mental
7 health appointment. Lee Decl., ¶ 23, MR, p. 369. On April 18, 2000, plaintiff complained to a
8 psychiatric social worker that defendant Lett had “made him mad.” Lee Decl., ¶ 23, MR, p. 367.
9 According to plaintiff, defendant Lett had not tapered off his Depakote prescription, resulting in
10 his having had seizures. Id.

11 Plaintiff advises the court to review the Physician’s Desk Reference (PDR) box
12 warning for Depakote (a copy of which page he does not include as an exhibit). Opp., p. 4. The
13 court’s review of that PDR text in the 1999 edition indicates in patients with epilepsy a loss of
14 seizure control may occur. PDR, p. 424. (Neither plaintiff nor his medical records suggest that
15 he suffers from epilepsy).

16 It is also stated that “[l]iver function tests should be performed prior to therapy
17 and at frequent intervals thereafter, especially during the first six months.” Id. Particular
18 warnings are directed to the prescribing of Depakate or Divalproex for children under two years
19 of age. PDR, p. 23. Plaintiff complains that defendant Lett did not order a liver panel and that
20 this does not comport with accepted medical practice; he also notes that he suffers from Hepatitis
21 C. Opp., p. 4. Dr. Lee states that liver panels would normally have been ordered by medical
22 doctors, who continued to renew the Depakote prescription after defendant Lett ordered the
23 initial prescription. Lee Decl., ¶ 21. Dr. Lee’s review of plaintiff’s medical files revealed
24 nothing to indicate that plaintiff prevented with symptoms during the time that defendant Lett

25 ¹⁹ Of course, it is much more likely that the mental problems afflicting plaintiff colored
26 his perceptions of the actions of other people.

1 prescribed Depakote from October 1, 1999 through February 7, 2000. Id. Moreover, in a
 2 second level appeal response, log no. HDSP-B-00-00422, plaintiff was informed by (non-
 3 defendant) Dr. Rholfing, that his liver was “okay” in an interview with him on November 21,
 4 2000. Id., citing Exh. 2. The actual text of the response states that Dr. Rohlring told plaintiff
 5 that his review of plaintiff’s lab results indicated that plaintiff’s liver was “okay though [his]
 6 bilirubin is elevated slightly.” Id. In addition, Dr. Lee notes that the medical records indicate
 7 that plaintiff’s Hepatitis C condition was monitored by HDSP medical staff with retesting on
 8 9/22/99, 9/30/99,²⁰ 2/12/00, and 4/11/01. Lee Decl., ¶ 11, MR, pp. 22, 49, 161-162, 165-167,
 9 169-170, 424.

10 Plaintiff, on the other hand, points to no expert medical opinion in support of his
 11 allegations against defendant Lett. Neither does he demonstrate that defendant’s actions were
 12 “criminally negligent,” particularly in the face of the medical record indicating that plaintiff’s
 13 Depakote prescription was never discontinued for the relevant period by any doctor, including
 14 defendant Lett. While treatment of plaintiff in the prison milieu was probably less than
 15 optimum, this is a far cry from deliberate indifference. Judgment should be entered for defendant
 16 Lett.

17 Defendants Sandham and Gilkes

18 Plaintiff alleges that both defendants Sandham and Gilkes are the acting Chief
 19 Medical Officer, and that each is responsible for HDSP’s medical department and for the
 20 procedures determining when an inmate is to be seen by medical staff. AC, pp. 1, 2. Plaintiff
 21 alleges that upon his having been received at HDSP, he informed medical staff that he had “had a
 22 possible problem with seizures and a degenerative back and foot problem and needed to be seen
 23 by medical staff,” which was not done. Id. As a result, plaintiff suffered “constant pain in his
 24 lower back and mobility problems.” Id. Defendants Sandham and Gilkes were responsible for

25 ²⁰ Any evaluation or retest done on September 30, 1999 is the only date for which the
 26 court could find no confirmation in the portions of the medical records cited.

1 authorizing the special lifts plaintiff needs to correct his back and foot problems. *Id.* Defendants
 2 Sandham and Gilkes were also responsible for assuring that newly arrived inmates are seen by
 3 medical staff if a seizure problem is noted. AC, pp. 1, 3. Defendants Sandham and Gilkes did
 4 not issue the authorization plaintiff needed for his “medical appliances” for over a year. AC, pp.
 5 1, 2-3.

6 As noted, plaintiff was transferred to HDSP on May 26, 1999. Defendants
 7 contend that plaintiff’s back and foot problems were monitored by medical staff and he was
 8 granted a lower tier, lower bunk, light duty medical chrono, on June 12, 1999, about two weeks
 9 after his arrival, based on his back/leg conditions. Lee Decl., ¶ 11, MR, p. 224. Plaintiff was
 10 issued medical chronos permitting him to wear Red Wing crepe sole shoes and orthotic shoe lifts
 11 on 9/15/99, 1/26/00, 5/19/00, 8/31/00, 4/26/01, and 6/20/01. Lee Decl., ¶¶ 11, 19, MR, pp. 3,
 12 19, 49, 55-56, 58B, 58, 221. Both defendants Sandham and Gilkes signed the September 15,
 13 1999 chrono, authorizing plaintiff’s use of Red Wing boots with orthotics. Lee Decl., ¶ 19, MR,
 14 p. 224. The court notes that on December 9, 1999, his medical records indicate that plaintiff was
 15 granted a priority on the podiatry line re: lifts in a physician’s order. MR, p. 17. “Red Wing
 16 outside boots” were also noted on October 13, 1999 as approved in a physician’s order. MR, p.
 17 18.

18 Plaintiff was seen on the podiatry line on February 10, 2000 by a (non-defendant)
 19 Dr. Knedge Hicks. Lee Decl., ¶ 19, MR, p. 58. On his August 31, 2000 progress record, it was
 20 noted that plaintiff’s orthotics fit well²¹ and did not need to be replaced. Lee Decl., ¶ 19, MR, p.
 21 56. Defendant Sandham renewed the boot chrono²² on April 26, 2001. Lee Decl., ¶ 19, MR, pp.
 22 221-222. Dr. Lee observes that plaintiff was seen more frequently by Drs. Rohlfing and Rhee
 23 than by defendant Sandham. Lee Decl., ¶ 19. Dr. Lee avers that any of these physicians could

24 ²¹ The notes actually state that the orthotics “seemed” to fit well and did not need to be
 25 replaced.

26 ²² The chrono was for “crepe sole boots.”

1 have issued a chrono for lifts if such was determined to be a medical necessity or if the ones
 2 plaintiff already had had been found to be inadequate. Lee Decl., ¶ 19. Neither defendants nor
 3 plaintiff points to an entry in his progress notes that appears to be dated January 26, 2000 and
 4 states that plaintiff “still has not gotten the boot & orthotic....”, which, inter alia, appeared to
 5 have been ordered. MR, p. 58. Dr. Lee does state, however, that there is no evidence in the
 6 medical file that indicates that any delay in issuing a medical chrono caused plaintiff medical
 7 injury. Lee Decl., ¶ 19, MR generally. Dr. Lee was unable to discover any description in
 8 plaintiff’s medical record to indicate that his back and foot conditions were “degenerative.” Lee
 9 Decl., ¶ 18, MR generally.

10 In his opposition, plaintiff has modified his allegation against defendants
 11 Sandham and Gilkes to the extent that he states that approval for the lifts and Red Wing boots
 12 took over four months (as opposed to more than a year). Opp., p. 5. Plaintiff notes that his
 13 medical records indicate the need for special lifts and shoes as far back as 1978. *Id.*, citing MR,
 14 p. 261. Plaintiff argues that the lifts and Red Wing boots he needed were denied pending
 15 approval for the four-month period even though doing so would exacerbate his medical
 16 condition, including increasing his pain and causing degeneration of his back condition. Opp., p.
 17 5. Plaintiff further contends that on June 15, 1993 a CT scan was performed and radiology
 18 reports showed a lower back problem with “probable nerve root encroachment, secondary to
 19 disc disease.” Opp., p. 6, MR, pp. 198-201, 249. The court notes that what plaintiff does not
 20 point out was that the above comment was noted as an “impression” on April 16, 1993, prior to a
 21 CT scan that was performed in June of 1993. Also not cited by plaintiff is the June 24, 1993
 22 followup, which evidently was reported to plaintiff by Dr. Gregory Duncan:

23 Myelogram and CT scan were reviewed. There was some mild
 24 disc bulging at L4-5 and L5-S1, but no restriction of dye flow or
 25 cut-off of the sleeve of the nerve root. CT scan showed no
 26 significant abnormalities and the bone scan was cold.
IMPRESSION & PLAN: MECHANICAL LOW BACK PAIN
WITHOUT NEUROLOGIC DEFICIT OR ANY EVIDENCE OF
NEUROCOMPRESSION.

1 I recommend lumbar support to be used intermittently when he is
2 working or exercising. He may be released to full duty as tolerated
3 and to return to clinic in about 3 months for final check, no new X-
rays.

4 MR, p. 248.

5 According to plaintiff, on October 14, 2003, Salinas Valley State Prison staff
6 ordered a new MRI which showed plaintiff's lower back problem had substantially worsened
7 with the need for possible back surgery. Opp., p. 6. Plaintiff cites to and includes no exhibits in
8 support of this contention, but he does aver that defendants' treatment or lack of same
9 contributed to the alleged degeneration of his back condition. Id.

10 Plaintiff's evidence, either incomplete or insufficient, does not dispute a genuine
11 issue of material fact that the delay he endured (a delay which plaintiff has acknowledged was
12 four months in length rather than the more than one year initially alleged) before obtaining the
13 approval of defendants Sandham and Gilkes for new Redwing crepe sole boots or orthotics did
14 not constitute deliberate indifference to the medical condition of his back, leg and foot. Nor does
15 plaintiff demonstrate how only these two defendants could issue a medical chrono for the boots
16 and lifts. It has already been noted that plaintiff has not sufficiently disputed defendants'
17 evidence that intake staff were not informed of a "possible" seizure condition suffered by
18 plaintiff, thus defendants Sandham and Gilkes cannot be found to have been deliberately
19 indifferent in failing to assure that plaintiff was seen by medical staff upon intake or immediately
20 thereafter for this condition. Finally, even if defendants are responsible for a procedure, and/or
21 compliance with such a procedure, as to when inmate is to be seen by medical staff, plaintiff has
22 not rebutted defendants' evidence that such a delay rose to a constitutional deprivation suffered
23 by plaintiff. Shapley v. Nevada Bd. of State Prison Com'rs, supra, 766 F.2d at 408. Summary
24 judgment should be entered for defendants Sandham and Gilkes.

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1 Defendant Malan

2 Plaintiff alleges that defendant Malan, a dentist, who is the HDSP Health Care
3 Manager, is responsible for reviewing all medical orders and blood work. AC, p. 3. He claims
4 that the Health Care Manager is also responsible for overseeing all medical requests and
5 procedures and approving or disapproving any treatment or procedure. Id. Defendant Malan, as
6 a dentist, is unqualified to hold the Health Care Manager position. Id. Because defendant Malan
7 is acting “outside of the scope of his license” and does not understand plaintiff’s medical
8 problems, he is unable to get the treatment he needs and his life is thereby placed in jeopardy.
9 AC, pp. 3-4.

10 Defendants point out that plaintiff fails to specify what medical condition
11 defendant Malan failed to address properly when he was Health Care Manager and how his life
12 was placed in jeopardy. Lee Decl., ¶ 25. Dr. Lee finds no evidence in plaintiff’s medical file that
13 defendant Malan ever personally treated plaintiff. Id. Defendants’ medical expert states that a
14 Health Care Manager assists “in the administration of the institution’s health care delivery
15 system.” Id. Because the function of the Health Care Manager is administrative, any health care
16 professional can serve as a Health Care Manager. Id. Medical personnel make the medical
17 decisions and the Health Care Manager “tries to ensure that the process for implementing those
18 decisions is carried out smoothly.” Id.

19 Plaintiff’s only opposition applies to defendants Parks, Malan, Castro and Tristan.
20 Opp., p. 6. Plaintiff contends that he filed numerous 602 appeals to which all of these defendants
21 responded, which signifies that each had direct knowledge of plaintiff’s medical problems.

22 Defendants Castro and Tristan

23 Defendant Castro, HDSP Warden, and defendant Tristan, (then) Director of the
24 California Department of Corrections (CDC), were aware of plaintiff’s medical problems. AC,
25 p. 7. Defendant Castro is responsible for ensuring the proper medical treatment of HDSP
26 inmates, and defendant Tristan is responsible for the medical treatment of the entire inmate

1 population of the state, but both have failed to investigate problems or make any necessary
2 changes in the medical treatment provided inmates. AC, pp. 7-8. Their refusal to accept their
3 responsibility for the care and treatment of inmates has allowed plaintiff to suffer seizures caused
4 when he was treated by untrained or incompetent medical staff. Id.

5 Defendants contend that plaintiff's allegations with respect to these two
6 defendants are too general for them to discern precisely what problems plaintiff alleges needed
7 investigating and what changes to treatment would have been necessary. Lee Decl., ¶¶ 26-27.
8 Defendants assert that there is nothing in plaintiff's medical records that demonstrate that either
9 defendant was personally aware of plaintiff's medical problems or of any improper medical care
10 occurring at HDSP. Id. As to defendant Castro, in Dr. Lee's experience, a warden does not
11 make changes to an institution's health care delivery system unless directed to do so by the
12 CDC's Health Services Division or if something specific has happened that has specifically been
13 brought to the attention of warden requiring change. Lee Decl., ¶ 26. In such a case, the warden
14 would rely on the advice and expertise of medical staff before implementing any such change.
15 Id.

16 As noted, plaintiff's opposition simply asserts that these defendants had personal
17 knowledge of his particular medical problems as a result of the numerous 602 medical appeals
18 that he filed.

19 As to defendants Parks,²³ Malan, Castro and Tristan, defendants argue that
20 plaintiff's allegations seek to impute supervisory liability upon them and that a supervisory
21 official under § 1983 made be held liable only if he was personally involved in the constitutional
22 deprivation or there was a sufficient causal connection between the supervisor's wrongful
23 conduct and the constitutional violation. MSJC, p. 17, citing Redman v. County of San Diego,
24 942 F.2d 1435, 1446-47 (9th Cir. 1991). Plaintiff asserts, as noted, that these defendants were

25 ²³ The court has previously stated that summary judgment for defendant Parks will be
26 recommended, see discussion, supra.

1 personally involved because he directed numerous appeals to them to which they responded,
 2 although plaintiff does not identify those appeals herein. Opp., p. 6.

3 The Civil Rights Act under which this action was filed provides as follows:

4 Every person who, under color of [state law] . . . subjects, or causes
 5 to be subjected, any citizen of the United States . . . to the
 6 deprivation of any rights, privileges, or immunities secured by the
 Constitution . . . shall be liable to the party injured in an action at
 law, suit in equity, or other proper proceeding for redress.

7 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
 8 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
 9 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
 10 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
 11 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
 12 omits to perform an act which he is legally required to do that causes the deprivation of which
 13 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

14 Moreover, supervisory personnel are generally not liable under § 1983 for the
 15 actions of their employees under a theory of respondeat superior and, therefore, when a named
 16 defendant holds a supervisory position, the causal link between him and the claimed
 17 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
 18 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S.
 19 941 (1979). Vague and conclusory allegations concerning the involvement of official personnel
 20 in civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th
 21 Cir. 1982).

22 However, “[s]upervisory liability exists even without overt personal participation
 23 in the offensive act if supervisory officials implement a policy so deficient that the policy ‘itself
 24 is a repudiation of constitutional rights’ and is ‘the moving force of the constitutional violation.’”
 25 Redman, supra, 942 F.2d at 1447.

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1 Plaintiff cites no case law in support of the proposition that the processing of his
2 inmate grievances, no matter how numerous, by defendants constitutes their personal
3 involvement in any alleged constitutional deprivation to which he was subject. Neither a prison
4 official's involvement with processing an appeal, Olim v. Wakinekona, 461 U.S. 238, 249, 103
5 S. Ct. 1741 (1983), nor the failure of an official to process an appeal, Mann v. Adams, 855 F.2d
6 639, 640 (9th Cir. 1988), constitute constitutional violations. Moreover, plaintiff has not been
7 able to demonstrate that any constitutional violation ever occurred. Defendants' motion should
8 be granted and judgment entered for these defendants.

9 Accordingly, IT IS HEREBY ORDERED that:

10 1. Defendants' motions for partial summary judgment as to plaintiff Johnson, re-
11 noticed on October 13, 2004 and October 21, 2004, are vacated;

12 2. An evidentiary hearing must be set to determine whether plaintiff is being
13 deprived of access to legal materials relevant to this case.

14 IT IS HEREBY RECOMMENDED that defendants' motion for partial summary
15 judgment as to plaintiff Capogreco, re-noticed on October 13, 2004, be granted and judgment be
16 entered for defendants as to this plaintiff and this case proceed only on plaintiff Johnson's
17 claims.

18 These findings and recommendations are submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
20 days after being served with these findings and recommendations, any party may file written
21 objections with the court and serve a copy on all parties. Such a document should be captioned
22 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
23 shall be served and filed within ten days after service of the objections. The parties are advised

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1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: 9/2/05

/s/ Gregory G. Hollows

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5 GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

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